UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/376/Add. 2
6 July 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-sixth session
Vienna 5 - 23 July 1993

MODEL LAW ON PROCUREMENT

Compilation of Comments by Governments

Japan

Japan believes that the draft Model Law on procurement, when adopted, would contribute a great deal to harmonizing and bringing uniformity to national laws on procurement and would thus facilitate international commercial transactions. To this end, the Model Law should be formulated to be acceptable to as many countries as possible, and in keeping with general legal precepts of those countries. However, apart from some provisions, especially those contained in chapter V, which would not be fit for Japan to incorporate into its domestic legislation, the present text of the Model Law contains provisions with respect of which there seems to be some room for improvement, bearing in mind the existence of an international instrument as well as of national laws on procurement. In this connection, the following comments are offered.

Article 2 "Construction" as defined in paragraph (d) sometimes comprises various types of services themselves. It seems difficult in those cases to draw a line between services incidental to construction and services not incidental to construction. The words, "or to the construction", at the beginning of the third line of paragraph (a), therefore might not be necessary.

Article 6 Japan is not opposed to the substance of this article. However, according to the present paragraphs (2) and (3), a procuring entity is not allowed to impose requirements other than those provided for in paragraph (2) with respect to the qualifications of suppliers and contractors. This approach seems too restrictive, since there might be a case where a procuring entity wants to establish requirements different than those contained in paragraph (2) for the qualifications, depending on such factors as what is going to be procured, the size of the procurement and the nature of the procuring entity. The basic idea behind these paragraphs would be the same as that expressed in sub-paragraph (b) of article 5(2) of the GATT Agreement on Government Procurement, which reads, "any conditions for participation in tendering procedures shall be limited to those which are essential to ensure

(9583T)

V.93-87132

the firm's capability to fulfil the contract in question." Therefore, the present paragraphs (2) and (3) should be formulated in such a manner that would make it possible for a procuring entity to add any other requirements to those contained in paragraph (2), as long as those requirements met the guidelines in the Agreement on Government Procurement referred to above, leaving detailed requirements for the qualifications to procurement regulations.

Article 9 Under Japanese national law, a procuring entity may prohibit the submission of tenders by mail, where necessary for administrative reasons. It is not clear under paragraph (3) of this article whether or not a procuring entity may limit the mode of communications to particular means, although paragraph (1) of this article seems to allow a procuring entity to do so.

Article 18 With a view to promote transparency in selective tendering procedures under paragraph (3), it is suggested that, even where selective tendering procedures are employed, a notice of each proposed procurement should be published in the same manner as prescribed in paragraph (1). This suggestion is also in line with article 5(4) of the GATT Agreement on Government Procurement.

Article 26 Paragraph (3) of this article conflicts with Japanese national law, under which suppliers or contractors are not allowed to modify or withdraw their tenders once those tenders have been submitted to the procuring entity. This policy is based upon several grounds such as to ensure fair competition, to exclude unjust tenders, to require suppliers and contractors to consider carefully before submitting tenders and to expedite tendering procedures, all of which we believe to be quite reasonable. Article 26(3) should therefore be amended to permit a procuring entity to restrict or prohibit any modification or withdrawal of tenders after their submission, provided that these restrictions or prohibitions are made clear in solicitation documents.

Article 29 Admitting factors contained in paragraph (4)(c) as criteria for the successful tender could negate the purpose of the Model Law and of open tendering procedures, making the process of evaluation tenders unclear and, possibly, unfair. The deletion of paragraph (4)(c) would be preferable. At the least, the list of factors in paragraph (4)(c) should be exhaustive, not illustrative.

Article 32 With regard to paragraph (6), a notice of the procurement contract should not only be given to other suppliers and contractors but, in order to promote transparency, should also be published. In addition, this requirement of publication should, for the same reason, be extended to other methods of procurement, including single-source procurement. This suggestion is in line with article 6(1) of the GATT Agreement on Government Procurement.